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No. 97-288

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

VICKY LEWIS, *et al.*,

Petitioners,

v.

BRUNSWICK CORP.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

BRIEF OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Federal Boat Safety Act of 1971 preempts a state common law requirement that recreational boats be equipped with propeller guards, where the United States Coast Guard, after extensive administrative proceedings, determined that such a requirement would be contrary to the interests of boat safety.

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BRIEF OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters nationwide.[1] WLF regularly appears before federal and

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[1] Pursuant to Supreme Court Rule 37.6, WLF hereby states that no counsel for a party in this case authored this brief in whole

(continued...)

state courts to promote economic liberty, free enterprise principles, and a limited and accountable government. To that end, WLF has appeared before this and other federal and state courts in cases involving federal preemption issues, arguing that the American economy suffers when multiple layers of government seek simultaneously to regulate the same business activity. *See, e.g., Medtronic, Inc. v. Lohr*, ___ U.S. ___, 116 S.Ct. 2240 (1996). Also, WLF's Legal Studies Division has published papers on federal preemption and related topics. *See, e.g.*, Paul LeRoy Crist, *Federal Preemption of State Tort Claims After Medtronic, Inc. v. Lohr* (WLF WORKING PAPER January 1997). WLF thus brings a broader perspective to the issues in this case than that presented by the parties in this action.

WLF is filing this brief with the consent of both parties. WLF has lodged consent letters with the Clerk of the Court.

STATEMENT OF THE CASE

In the interest of judicial economy, WLF hereby incorporates by reference the Statement of the Case in respondent's brief.

In brief, this case arises from a tragic accident in which petitioners' daughter "fell or was thrown" from a boat in which she was riding on Strom Thurmond Lake in Georgia. Pet. App. A3. The decedent died from injuries resulting from being struck in the head and body by the propeller of

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[1](...continued)
or in part, and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

the boat's engine. *Id.* at A3-A4. The engine was designed and manufactured by respondent; it was not equipped with a propeller guard. *Id.*

Petitioners filed suit against respondent in Georgia state court, alleging that the lack of a propeller guard made the engine a defective product. Pet. App. 4A. Respondent removed the case to federal court, and the federal district court granted respondent's motion for summary judgment on petitioners' state tort law claims, holding that the claims were preempted by the Federal Boat Safety Act ("FBSA"), 46 U.S.C. §§ 4301, *et seq*. *Id.* The United States Court of Appeals for the Eleventh Circuit affirmed, holding that while petitioners' common law claims were not expressly preempted by § 4306 of the FBSA because of the Act's "savings clause" in § 4311(g), those claims were impliedly preempted because "claims based on the failure to install a product that the Coast Guard has decided should not be required would conflict with the regulatory uniformity purpose of the [FBSA]." Pet. App. A22. The Eleventh Circuit found that, after extensive public investigation, the Coast Guard concluded that propeller guards should not be required on recreational boats; in fact, such a requirement might create additional hazards to boaters.

SUMMARY OF ARGUMENT

This case presents an important question concerning Congress' ability to promote uniform rules for the design and manufacture of products, in this case, boats, free from widely disparate state common law requirements. The issue has special significance in this case, which concerns congressional action in an area in which the federal interest dominates. This Court has long recognized the dominant

federal interest in matters of admiralty and maritime law, and the Congress specifically invoked the admiralty and maritime jurisdiction when enacting the FBSA, citing traditional concerns for the need for uniform rules of conduct in order to promote commerce.

In any field, however, the touchstone for analysis of preemption must be Congress' intent, and in enacting the FBSA, Congress intended to create uniform national standards for safe boat design and manufacture. Thus, the FBSA broadly preempts any state "law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under section 4302 of this title." 46 U.S.C. § 4306.

A propeller guard is associated equipment, and the Coast Guard has most decidedly not promulgated any regulation identical to the common law liability petitioners would have the state court impose on respondent. To the contrary, the Coast Guard has declined to require propeller guards, in part based on the possibility that such a requirement could actually increase dangers to boaters. To the extent the FBSA contemplates a continued role for states in boat safety, that role is state participation and coordination in boat safety programs, the imposition of requirements for carrying or using marine safety articles to meet uniquely hazardous local conditions, and regulation concerning safe boat operation and use. Congress did not intend to allow fifty different states using lay juries to establish differing standards for boat design and manufacture.

Further, it is no obstacle to preemption that the Coast Guard's decision not to require propeller guards was not made in the context of an Administrative Procedures Act ("APA") rulemaking. The FBSA preempts any state law or requirement which is not identical to a Coast Guard regulation under the FBSA, and if the Coast Guard has not imposed a regulation, the state requirement cannot be identical. It simply does not matter that the Coast Guard did not perform an APA rulemaking in order to refrain from regulating. Moreover, the APA was intended to allow potentially burdened parties to have input into the development of regulations which could be imposed upon them, and to ensure that the relevant agency fully considers the impact of proposed regulation before imposing government regulation on an activity. An agency is not required to follow the APA simply in order to justify the continued operation of the free market, *i.e.*, in order to decide to *refrain* from regulation.

This Court should likewise reject petitioners' contention that, for preemption purposes, state common law claims operate differently than state statutory or administrative enactments and therefore should not be preempted. This Court's plurality opinion in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) rejects this contention. A common law damages claim can have every bit as much of an effect on altering design and manufacturing standards as would a state statute or regulation. This is particularly true considering that a common law action could result in a punitive damage award against a manufacturer, particularly if a manufacturer failed to alter its conduct after a prior judgment against it. Petitioners' economic analysis of state common law liability also fails to consider the impact of having numerous differing standards of liability across fifty

states. Thus, state common law liability presents a potential obstacle to federal uniformity just as much as would state statutes or regulations.

ARGUMENT

I. CONGRESS INTENDED TO CREATE UNIFORM NATIONAL STANDARDS FOR SAFE BOAT DESIGN AND MANUFACTURE

Petitioners and their supporting *amici* argue repeatedly that a finding of preemption in this case is inappropriate due to the "strong" presumption against preemption. *See, e.g.*, Brf. of Pet. at 16, 23; Am. Brf. of Association of Trial Lawyers of America ("ATLA") at 8. Petitioners and their *amici* have misconstrued the nature of the "presumption" that exists in preemption cases. Any such preemption is merely a tool to be used in deciding the ultimate issue in this case: did Congress intend to preempt product liability actions of the type brought by petitioners? Presumptions regarding congressional intent are relied upon only in the absence of more direct evidence of that intent. As discussed *infra*, the language of the FBSA as well as other traditional indicia of congressional intent make clear that Congress fully intended to preempt this type of action. Accordingly, the "presumption against preemption" cited by petitioners is irrelevant in this case.

State governments unquestionably have an important role to play in our federal system of government. Nevertheless, there can be no dispute that, ultimately -- under the Supremacy Clause, U.S. Const., art VI, cl. 2 -- it is for the national government to decide how large a role the states are to play in any given issue. The national

government is free to go so far as to preempt all state jurisdiction over an issue, so long as its actions are consistent with the Tenth Amendment.

Whether the national government has preempted all state jurisdiction over a given issue "fundamentally is a question of congressional intent." *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988). In discerning congressional intent, the starting point is the language of the statute at issue; "when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." *English*, 496 U.S. at 79. Courts may also look to the "structure and purpose of the statute" in discerning congressional intent. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 132, 138 (1990).

The broad preemptive language of the FBSA indicates that Congress intended to preempt some forms of state regulation of boat design and manufacture. The FBSA provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or a political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances

within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306.

Petitioners contend, nonetheless, that in light of the "presumption against preemption," the FBSA's preemption provision should be given the narrowest construction that could plausibly be squared with the statutory language. Thus, petitioners go so far as to suggest that the preemption provision should not be interpreted as applying to state regulation in the form of common law tort actions because the statutory language refers to "law or regulation," "safety standard," or "requirement for associated equipment," but does not explicitly state "common law". This argument runs counter to normal canons of statutory interpretation. Words in a statute are to be given their ordinary meaning. If Congress intended, as demonstrated by its statutory language, that a preemption provision is to be broad in scope, it is not for the courts to override that intent by resort to a contrary "presumption." *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (preempting state fare-advertising regulations); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983) (preempting state laws relating to any employee benefit plan).

To the extent the FBSA saves state law claims,[2] the statute is best construed as saving state law claims based on violation of those state law requirements which the FBSA specifically contemplated would remain viable, such as those

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[2] *See* 46 U.S.C. § 4311(g) ("[c]ompliance with this chapter or standards, requirements, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.").

concerning the carrying or use of marine safety articles, or those directed at safe boat operation and use. *See* S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1331 (discussing Section 10). In the alternative, the FBSA could be construed as the Eleventh Circuit construed it in this case, saving only state law claims based on the negligent or defective design or installation of products required by the Coast Guard or provided voluntarily by manufacturers. To read the savings clause as petitioners suggest would render the FBSA's preemption clause a nullity.

In sum, there is no reason for this Court to resort to "presumptions" in interpreting the FBSA. If one gives the words of the FBSA their ordinary meaning, Congress's intent to preempt petitioners' state law cause of action is clear.

II. CONGRESS ENACTED THE FBSA TO REGULATE A FIELD IN WHICH THERE IS A DOMINANT FEDERAL INTEREST

Petitioners' reliance on a "strong presumption against preemption" is even more inappropriate in a case such as this where the legislative subject matter implicates a dominating federal interest. Thus, to the extent this Court needs to look to the structure and purpose of the FBSA to determine its preemptive scope, federal preemption applies with special force in this case because Congress enacted the FBSA to further the preeminent federal interest in providing uniform rules of conduct in the field of admiralty and maritime law.

Petitioners and their *amici* significantly understate the strong federal interest in this field, which has traditionally been a matter of federal law. *See, e.g.*, Am. Brf. of Trial Lawyers for Public Justice, P.C. ("TLPJ") at 14 (suggesting FBSA regulates "safety," a field traditionally regulated by state and local authorities). In this respect, it is clear that Congress in enacting the FBSA was not legislating concerning the matter of safety generally, or even product design and manufacture generally, but rather in the specific field of *boat* safety, a matter well within Congress's constitutional grant of authority in the field of admiralty law. *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 361 (1959) (constitutional grant of admiralty and maritime jurisdiction empowered Congress to revise and supplement maritime law within the limits of the Constitution); *see also Sisson v. Ruby*, 497 U.S. 358, 367 (1990) (federal admiralty jurisdiction extends to tort claims emanating from fire caused by pleasure boat docked at marina); *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) (federal admiralty jurisdiction applies to products liability claims concerning vessel component which causes injury to things other than the product itself); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 677 (1982) (federal admiralty jurisdiction extends to collision of two pleasure boats). Even judge-made general maritime law is supreme to state statutory and decisional law within this field. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 314 (1955); *Garrett v. Moore-McCormack Co., Inc.*, 317 U.S. 239 (1942).[3]

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[3] It should also be noted that where there is a conflict between federal statutory law and judicially-created general maritime law, *i.e.*, "horizontal preemption", statutory law prevails. *Miles v. Apex Marine* (continued...)

Thus, this is a case where congressional intent to preempt state law may be inferred from a "dominant federal interest" in the field. *See, e.g., Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989) (state intellectual property action preempted despite absence of federal regulation in field because of dominating federal interest evidenced by congressional enactment of patent laws); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 505-06 (1988) (implying intent to preempt field based on uniquely federal interest in liability of independent contractors performing work for federal government); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774-775 (1947) (failure of NLRB to entertain certain actions constituted determination by Board that certain units were not appropriate for bargaining purposes); *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) (implying intent to preempt field concerning obligations on aliens from dominating federal interest in foreign affairs); *Napier v. Atlantic Coast Line R.R.. Co.*, 272 U.S. 605, 613 (1926) (preempting state positive law because federal statute occupied field, although agency had not yet exercised its authority to full extent conferred).

It cannot be seriously questioned that Congress intended to invoke its power to legislative in this field, and by so doing to promote uniform rules for safety in boat design. Senate Report at 17 ("[g]eneral jurisdictional applicability is to vessels within the historic federal maritime jurisdiction .

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[3](...continued)
Corp., 498 U.S. 19, 24 (1990). Thus, in a case such as this where Congress has enacted legislation within its power under the constitutional grant of admiralty and maritime jurisdiction, it presents the strongest case for preemption of state law.

. . ."). In explaining the federal preemption provision of the FBSA, the Senate Report explained:

> This section provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements.

Id. at 20.

It is correct, as petitioners and their *amici* contend, that Congress intended a coordinated approach between the federal and state governments. However, the Senate Report on the FBSA makes clear that state participation in boat safety efforts was to be accomplished, not through fifty separate regulatory schemes, but rather through federal grant-in-aid incentive payments to states with state boating safety programs. Senate Report at Section 2 ("[t]his [policy and purpose] is to be done by encouraging and assisting participation by the States, the boating industry and the boating public to develop more comprehensive safety programs, [and] by authorizing the establishment of *national* construction and performance standards . . . .") (emphasis added).

The Senate Report's explanation of Section 10 of the FBSA, concerning preemption, further explains that state law was not to be completely displaced with respect to "serious hazards which are unique to a particular locale and

which would justify variances with respect to carrying or using marine safety articles . . ." or with respect to " . . . safe boat operation and use . . . ."). Such concerns do not suggest that states may continue to impose boat safety design and manufacture requirements in the face of a Coast Guard determination that a particular requirement would be unwise. To the contrary, the FBSA specifically precludes such "law or regulation," "safety standard," or "requirement for associated equipment," which is not identical to a Coast Guard requirement. 46 U.S.C. § 4306.

Moreover, it is not a complete statement of the congressional purpose to suggest that the FBSA represents an effort to promote safety to the exclusion of all other congressional interests. As with any legislation, be it boat safety, civil rights, or medical device regulation, the FBSA represents an attempt by Congress to balance safety against other competing interests, in this case, consumer choice, the need for uniformity of rules of conduct, and the promotion of maritime and interstate commerce. *See* Senate Report at 14 ("[t]he need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level."); *id.* at Section 5 (" . . . the requirement . . . that standards be 'reasonable', necessarily also involves a consideration of technical feasibility and cost. Similarly, it is intended that the Secretary will consider the desirability of affording consumers a continued wide range of choice as to types of vessels and thus that standards may differ with respect to different types of vessels . . . .").

Thus, Congress sought to achieve uniformity in *rules* of safe boat design, and not uniformity in boats, as petitioners

and their *amici* appear to contend. Further, it is approaching folly to propose that such uniformity in rules of conduct will be achieved by allowing fifty different states to use juries to determine boat safety standards. *See* Pet. Brf. at 15 (proposing that common law liability would promote uniformity because "manufacturers [now] have the unregulated ability to build protective devices of all shapes, sizes, materials and designs, or to provide none at all.") In essence, petitioners' argument in this respect resembles a "big bang" theory of rulemaking, in which it is hoped that a multistate explosion of common law suits against boat manufacturers will result in an orderly universe of boat safety law and an appropriately-balanced uniform rule which all manufacturers may [indeed, must] follow. Given Congress's clear intent to achieve a uniform scheme of regulation, as opposed to uniformity of boat design, this Court should reject petitioners' argument.

Lower courts dealing with statutory admiralty preemption have consistently recognized the strong federal interest in precluding state law claims which would impede uniformity of rules of conduct. For example, the Fifth Circuit has held that:

> In these circumstances, the LHWCA [Longshore and Harbor Workers' Compensation Act] is plainly preemptive of any state law claim for intentional or bad faith wrongful refusal to pay benefits due under the Act, and this is true even in the absence of any expressly preemptive language. As the Supreme Court stated in *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 151, 102 S. Ct. 3014, 3022, 73 L.Ed.2d 664 (1982), "Absent explicit preemptive language,

> Congress' intent to supersede state law altogether may be inferred because '[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it' . . . or because 'the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.'" Moreover, "[e]ven where Congress has not completely displaced state regulation in a specific areas, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises . . . when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* In order to find such an actual conflict for this latter purpose, it is not necessary that compliance with both state and federal law be impossible. *Id.* at 3022-23.

Atkinson v. Gates, McDonald & Co., 838 F.2d 808, 812 (5th Cir. 1988); *accord Barnard v. Zapata Haynie Corp.*, 975 F.2d 919 (1st Cir. 1992).

The Fifth Circuit has therefore concluded that:

> Although state law may occasionally be utilized to fill the gaps in an incomplete and less than perfect maritime system it cannot be employed to contravene an act of Congress, to prejudice the characteristic features of the maritime law or to disrupt the harmony it strives to bring to international and interstate relations.

Exxon Corp. v. Chick Kam Choo, 817 F.2d 307, 316-17 (5th Cir. 1987) (citation omitted), *rev'd on other grounds*, 486 U.S. 140 (1988), *on remand*, 849 F.2d 910 (5th Cir. 1988); *see also State of Maryland Dep't of Natural Resources v. Kellum*, 51 F.3d 1220 (4th Cir. 1995) (general maritime law of negligence preempts state statute imposing strict liability for damages to oyster bars); *Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 360 (5th Cir. 1995) (LHWCA preempts claim under Texas Deceptive Trade Practices Act).

This Court's recent decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, ___ U.S. ___, 116 S.Ct. 619 (1996), does not compel a different analysis in the context of this case. In *Yamaha*, this Court considered whether the general maritime law of wrongful death preempted state wrongful death and survival statutes in the case of a twelve-year old girl killed in a jet ski accident in state waters. As contrasted with this case, in *Yamaha* there was no federal statute which explicitly preempted state law claims; instead, the Court considered the preemptive effect of its own decisions under the general maritime law.

Owing in large part to the historical development of the maritime wrongful death remedy, which resulted in courts allowing state wrongful death statutes to supplement federal maritime law, this Court held that state statutes were not preempted by general maritime law in a case involving a non-seaman injured in state waters. *Id.* at 621-22. Moreover, the Court's ruling was carefully limited to the availability of certain types of damages; the Court specifically reserved judgment on whether state law could provide the standards governing liability. *Id.* at 629 n.14.

In sum, to the extent this Court needs to consider the structure and purpose of the FBSA to interpret its preemptive scope, Congress's desire for a uniform federal scheme of regulation dictates that petitioners' common law claims are preempted. Moreover, the dominant federal interest in admiralty and maritime law militates against any "strong presumption against preemption."

III. IT WAS NOT NECESSARY FOR THE COAST GUARD TO FOLLOW THE ADMINISTRATIVE PROCEDURES ACT IN ORDER FOR ITS DECISION NOT TO REGULATE TO HAVE PREEMPTIVE EFFECT

The Eleventh Circuit correctly held that even if petitioners' common law claims were not expressly preempted by the FBSA, those claims were impliedly preempted. This Court has stated that, "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision *to* regulate." *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (emphasis in original). Thus, a decision not to regulate will have preemptive effect "where [the] failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) (citations omitted).

In this light, it is no answer to suggest that the Coast Guard's decision not to require propeller guards has no preemptive effect because its non-regulation did not take the

form of a rule adopted through the procedures of the Administrative Procedures Act. *See generally* Am. Brf. of National Conference of State Legislatures, et al. It was not necessary for the Coast Guard to have affirmatively prohibited propeller guards in order for its decision to have preemptive effect. Indeed, the Coast Guard determined that the interests of boat safety and uniform regulation were best served not by either prohibiting propeller guards or requiring them, but rather by continuing to allow consumer choice and product development to take its course through the free market.

The Coast Guard's decision that a propeller guard requirement was not wise is no less preemptive than if it had issued a regulation prohibiting propeller guards, or allowing some types of propeller guards but not others, because the FBSA preempts any state "law or regulation," "safety standard," or "requirement for associated equipment," which is "not identical to" a Coast Guard regulation under the FBSA. 46 U.S.C. § 4306. Certainly, where the Coast Guard has determined that requiring propellers would be unnecessary or unwise, a state common law requirement of a propeller guard cannot be deemed identical to a non-existent Coast Guard regulation. Using analogous reasoning, the Coast Guard has historically interpreted the FBSA to preempt state positive laws and regulations, but not state common law, even when there is no counterpart federal regulation in effect. *See* Am. Brf. of United States at 14-15 n.7.

It would be a strange creature of administrative law if the Coast Guard were required to go through all the steps of an APA rulemaking simply to allow the free market to take its course without the intrusion of government regulation or

state law. The purpose of the APA is to allow public input and thorough consideration of regulatory proposals which would alter the status quo by burdening some individual or business sector with government regulation; the purpose is decidedly not to require the free market to justify its continued existence.

The character of the Coast Guard's decision not to require propeller guards only serves to underscore why a non-identical state requirement is preempted. Based on the findings of the National Boating Safety Advisory Council, which is composed two-thirds by recreational boaters, the general public, and representatives of State boating safety programs, *see* 46 U.S.C. § 13110(b)(1)(A)-(C), the Coast Guard found that a propeller requirement was not simply unnecessary but would be unwise. Indeed, the Board heard extensive evidence that a propeller requirement could increase possible dangers to boaters. Thus, the Eleventh Circuit concluded that the scientific data counseled against any regulation requiring propeller guards.

This Court's decision in *Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S.Ct. 1483 (1995), upon which petitioners rely, is readily distinguishable. In that case, this Court concluded that common law claims based on the failure to install antilock brakes were not preempted by the Vehicle Safety Act. However, in *Freightliner*, the relevant agency had indicated its intention to regulate braking systems by promulgating a regulation requiring installation of antilock brakes, but that regulation was struck down. The defendants argued that the absence of a regulation preempted state law claims, but this Court held that there was no preemption where there was "no evidence that [the agency] decided that [the product] should be free from all

state regulation." *Id.* at 1487. Of course, in this case, there is such evidence, specifically, a considered determination by the Coast Guard that a propeller guard requirement would be both unnecessary and unwise.

Further, unlike the FBSA, the Vehicle Safety Act evinced no intent to grant the relevant federal agency exclusive authority to issue safety standards. *Id.* at 1487. To the contrary, the Vehicle Safety Act's preemption clause implied that states could impose safety standards until the federal government imposed a different standard; because the federal standard was struck down, states could continue to impose common law requirements. *Id.* at 1487-88. The Court in *Freightliner* specifically distinguished and preserved *Atlantic Richfield* as a case where the lack of regulation resulted from an affirmative agency decision to refrain from regulation. *Id.* at 1487.

The Congress's intent that any non-identical state "law or regulation," "safety standard," or "requirement for associated equipment," be preempted did not require the Coast Guard to pursue an APA rulemaking in order to refrain from regulating. Even if the Coast Guard was required to make an affirmative agency decision in order for its decision to have preemptive effect, the Coast Guard did so when, heeding the recommendations of the Advisory Council, it declined to require propeller guards.

IV. A COMMON LAW IMPOSITION OF LIABILITY WOULD BE NO LESS DAMAGING TO FEDERAL UNIFORMITY THAN A STATE STATUTORY OR ADMINISTRATIVE REQUIREMENT

The common law claims petitioners seek to advance are no less intrusive on a uniform scheme of federal regulation than would be a state statutory or administrative requirement of a propeller guard. The imposition of a duty on manufacturers to provide propeller guards is, at least for purposes of preemption analysis, every bit as much of an imposition as if it had been imposed by state statute or regulation, and has the same negative impact on a uniform federal scheme. Petitioners' *amici* attempt to suggest a distinction based upon the notion that a manufacturer may simply elect to pay a common law judgment and continue to manufacture boats without providing propeller guards, but this is no answer. It could just as well be said that a manufacturer might pay a civil statutory penalty or administrative fine without changing its conduct as a "cost of doing business." Further, petitioners' argument ignores the potential for a punitive damage award under common law, and the possibility that the likelihood of such an award would be enhanced if a manufacturer chose to ignore previous judgments against it for failing to provide a propeller guard. The prospect of compensatory and punitive damage awards will operate to destroy the uniformity of federal regulation dictated by the FBSA. *See* Schwartz, *Deterrence & Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 137 (1982) (" . . . ordinary civil damages -- in the course of providing compensation -- concurrently function to deter.").

This Court's plurality opinion in *Cipollone* specifically recognized that "[state] regulation can be as effectively asserted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Cipollone*, 505 U.S. at 521 (citation omitted); *see also Medtronic, Inc. v. Lohr*, ___ U.S. ___, 116 S.Ct. 2240, 2259 (1996) ("[o]ne can reasonably read the word 'requirement' as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law.") (Breyer, J., concurring); *cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (civil common law action implicates state action sufficient to trigger First Amendment scrutiny; "[t]he test is not the form in which state power has been applied, but, whatever the form, whether such power has in fact been exercised.").

Justice Breyer's concurring opinion in *Medtronic* appropriately pointed out the anomalous result of holding that a federal regulation preempts a differing state regulation but not a state tort law action premising liability on the failure to follow the state regulation. "The effects of the state agency regulation and the state tort suit are identical. To distinguish between them for pre-emption purposes would grant greater power . . . to a single state jury than to state officials acting through state administrative or legislative lawmaking processes." *Medtronic*, ___ U.S. at ___, 116 S.Ct. at 2259 (Breyer, J., concurring). Utilizing similar reasoning, this Court in *Cipollone* ruled that common law damage actions are premised on the existence of a legal duty which could constitute a "requirement or prohibition" within the meaning of a federal statute providing for preemption. *Cipollone*, 505 U.S. at 522; *see*

also Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117, 128 (1991) (phrase "all other law, including State and municipal law" does not "admit of [a] distinction . . . between positive enactments and common-law rules of liability.").

Moreover, the economic arguments presented by petitioners' *amici* fail to take into account the full cost of a disparate scheme of multistate regulation. *See, e.g.*, Am. Brf. of United States at 23 n.14; Am. Brf. of TLPJ at 23, 27. Petitioners' *amici* suggest that a common law judgment merely requires a defendant to pay for the consequences of its conduct and that this will result in the proper level of care; however, if the standard of liability at common law varies from one state to the next, the effect will be the same as if each state enacted a differing regulatory standard.

A defendant engaged in interstate sales would have to either: 1) adhere to the most rigorous requirement imposed by any state in order to avoid paying any judgments; 2) adhere to some middle ground requirement while paying judgments for its conduct in some states while that same conduct would be deemed lawful in others; or 3) sell different products in different states, no doubt causing product costs to rise. To the extent manufacturers opt to protect themselves from judgments (for example, by providing propeller guards) even though some states would not impose liability, consumer choice is stifled. Petitioners do not appear to recognize this part of the equation, viewing as they do all safety regulation as good and non-regulation as bad. This case presents a telling example why this viewpoint is short-sighted, because the Coast Guard found that propeller guards could *increase* the risk of accidents if required of all manufacturers.

This Court should not use flawed economic analysis to infer that Congress did not mean what it said when it preempted any non-identical state "law or regulation," "safety standard," or "requirement for associated equipment." A common sense construction of the FBSA's ordinary meaning dictates that petitioners' common law tort claims based on the respondent's failure to provide a propeller guard are preempted.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully urges the Court to affirm the Eleventh Circuit's ruling below.

Respectfully submitted,

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